entered pleas of guilty in the Southern District of New York, and the sentences imposed for the commission of these crimes.

The First Indictment

On April 8, 1954 Indictment C144-59 was filed in the Southern District of New York. It charged Gelb with five substantive violations of the federal narcotic laws, which he was alleged to have committed on March 4th and 5th, 1954.

Gelb entered his plea of guilty to these charges on May 5, 1954 and on the same day was sentenced to a term of five years imprisonment by the Honorable Sidney Sugarman.

The Second Indictment

On April 12, 1956, Indictment C150-30 was filed in the Southern District of New York. This was a two-count indictment charging the petitioner Gelb with the unlawful transportation of stolen bonds in interstate commerce, which acts according to the indictment were committed between January 1, 1950 to December 8, 1951.

Gelb entered his plea of guilty to the charges contained in this indictment on May 18, 1956 and on the same day was given a five-year suspended sentence and placed on five years probation by the Honorable Sylvester J. Ryan. The probationary period was ordered to commence at the expiration of the prison term Gelb was then serving on Indictment C144-59.

The Third Indictment

On October 23, 1957, Indictment C154-86 was filed in the Southern District of New York. This was a one-count indictment charging the defendant with conspiracy to violate the narcotic laws. The conspiracy was alleged to have continued from January 1, 1950 through and including May 1, 1955.

The indictment also alleged the commission of thirty overt acts in furtherance of the conspiracy. Saul Gelb was named as a participant in the second, sixth, seventh, eighth, ninth, tenth and eleventh overt acts as set forth in the indictments. The period of time covered by these seven overt acts were from October 24, 1952 to March 5, 1954. *The eleventh overt act alleged the same facts of the substantive offenses contained in Indictment C144-49.*

Additional Conceded Facts

Notwithstanding the defendant's plea of guilty on January 30, 1958, to Indictment 154-86, petitioner was continued in bail while on parole and probation until April 24, 1958 and he reported to his probation supervisor. The parole board at Leavenworth took no affirmative action to revoke parole.

On April 24, 1958 the Honorable Irving R. Kaufman imposed a five-year term of imprisonment and the $10,000 committed fine, remanded the petitioner.

The opinion of the court below, Judge Bryan, conceded that the petitioner did not violate probation nor parole nor was there an attempt made to revoke probation.

The government in its brief submitted to the Court of Appeals, Second Circuit. Conceded that the conspiracy charged to petitioner under Indictment 154-86 terminated on March 5, 1954.

On January 28, 1959 petitioner filed a motion to vacate and delare void this sentence. This motion was denied by Judge Bryan on May 12, 1959, and the Circuit Court of Appeals affirmed on June 17, 1959 on the opinion of Judge Bryan.

Statement

The issues presented in this case are novel and unique. There are no reported cases in any state or in this court concerning the facts herein. The unusual presentment of the indictments and the facts supporting the indictments brings to the fore for the first time the constitutionality of Section 3651, Title 18, passed by Congress in 1954.

Moreover, the facts, the indictments and the multiple sentences as presented here, will show a premeditated, deliberate, calculated intention on the part of the government to confine the defendant in a penitentiary for his natural life against his constitutional rights and in violation of due process. The parole and probation, given to the petitioner, gave him privileges of immunity from confinement if he complied with its terms. The privilege could become a vested right.

The action of the government in the presenting of the staggered indictments, assumed the risks of the court's sentences.

The failure on the part of Mr. Justice Edward Lumbard, a judge of the Court of Appeals, who was the United States Attorney on the return of indictment 144-59—to disqualify himself on the hearing of this application, was a denial of due process and basic principles of justice.

The confusion of the sentences, and the interruption of the parole and probation without a violation thereof, or a hearing was a further denial of due process. Your petitioner may only say that when the United States Government arrested him on March 5, 1954, they had knowledge of all the crimes that he had ever committed. They did not know whether to "fry him, broil him or sauté him." But they did all these three things to the petitioner in the handling of these indictments and in so doing, deprived petitioner of due process. The indictments which they presented, the sentences pronounced, complicated by the de-

cisions in the courts below present an issue of clarification to this court.

Unless his status is clearly defined, it will cause the petitioner additional legal expenses when he is released from his present illegal incarceration and will lead to a multiplicity of legal proceedings to determine his status, which should be presently decided by this court.

The reputation, character or conduct of the defendant should not enter into the court's decision.

REASONS FOR GRANTING THE WRIT

POINT I

The petitioner contends that his constitutional rights have been invaded and there has been a violation of due process. On March 5, 1954 the petitioner was arrested and charged with five counts in Indictment 144-59 with possession of narcotics and the overt acts therein alleged were committed on March 4 and March 5, 1954. It is interesting to note that though the petitioner was arrested on March 5, he is charged in this indictment with an overt act of possession on March 4, 1954. He was indicted on April 8, 1954 and on May 5, 1954 was sentenced by Honorable Sidney Sugerman for a period of five years on all counts to run concurrently.

The United States Attorney, on the date of sentence, pressed for a large sentence but notwithstanding his plea, the court gave the sentence as aforementioned. At the time of the sentence, Mr. Patterson from the United States Attorney's Office, which was then conducted by Circuit Judge Edward Lambard stated:

> "Mr. Patterson: He faces a number of charges as a result of the making of this case".

No action was taken by the government until April 12, 1956 when an indictment was returned against the peti-

tioner concerning overt acts committed between January 1, 1950 to December 8, 1951 on the charge of transporting stolen bonds in Indictment 150-30.

While in custody and on May 18, 1956 the petitioner pleaded guilty and was sentenced by Judge Ryan:

> "Sentence suspended, *probation for five years to begin upon his release from incarceration; probation subject to the standing probation order of this court*".

While the petitioner was incarcerated under the First Indictment he became eligible as a parolee under Title 18, Section 4203, Title 18, 4163 and 4164. His eligibility for parole under the good time statute became final and he was ready for release because of his good conduct in the penitentiary on November 14, 1957.

On October 23, 1957, about a month before his actual formal release from the penitentiary, subject to the supervision of the Parole Board, Indictment 154-86 was returned against this defendant, charging him with conspiracy to violate the narcotic law. He was one of forty-six defendants but the overt acts though numbered to thirty, commenced with January 1, 1950 and terminated with May 1, 1955. The defendant is charged with only seven acts and the last overt act charged against this defendant was March 5, 1954, being the very same act and the elements thereof as described in the indictment returned on April 8, 1954, namely, 144-59 (Government concedes—same act).

The defendant contends that when the Indictment 154-86 was returned to which he pleaded not guilty on November 14, 1957, he was then serving a sentence as a conditional parolee and that he then commenced to serve the sentence of Honorable Sylvester J. Ryan in Indictment 150-30. For under Title 18, Section 3651, the court had a right to impose a probation sentence and under the language and terms of the sentence of Judge Ryan the petitioner com-

menced to serve two sentences concurrently, the language of Judge Ryan's sentence falls clearly within the law enunciated in *U. S. v. Murray*, 275 U. S. 347. "Probation is not sought to shorten a term, probation is the attempted saving of a man who has taken a wrong step". On page 358, "the beginning of a service of a sentence in a criminal case ends the power of a court even in the same term to change it. Such a limit for probation is a natural one to achieve its end." And on page 359, the court stated further "it is true that there was but one day of execution of a sentence in the *Murray* case but the power passed immediately * * * and there had been one day of it served."

The petitioner contends that on October 23, 1957, the Parole Board at Leavenworth knew of indictment 154-86 notwithstanding this indictment, the petitioner was released as a conditional parolee on November 14, 1957.

Immediately, he commenced to serve his probation sentence of Judge Regan, imposed on May 16, 1956 under indictment 150-30.

The commencement of a sentence could not be interfered with or interrupted once it had commenced and surely it did commence when he enjoyed even one day of freedom. This occurred under the principles enunciated in the aforementioned case on November 15, 1957.

On January 30, 1958 the petitioner pleaded guilty to the Indictment 154-86 and the Court postponed sentence without date. Yet during the period from January 30, 1958 until April 24, 1958 even up to his present confinement, the defendant did not commit any crime, did not violate his probation, nor did the Parole Board upon his plea of guilty, revoke his parole. The reason that the Probation Board, as well as the Parole Board, did not take any affirmative action to revoke either, is because the acts charged in the Indictment 154-86 were not acts in violation of either parole or probation. The parole and probation which the

petitioner enjoyed was a privilege ~~not~~ to be a right ~~unless~~ ~~he obeyed~~ full compliance therewith. He had just commenced to serve his parole and probation and as the court conceded below in its opinion by Judge Bryan:

> "Judge Kaufman did not as defendant contends find him guilty of violation of probation granted by Judge Ryan, nor did Judge Kaufman revoke the probation nor attempt to modify."

In Title 18, U. S. Code Section 3653 and 3654, there is reference to revocation of probation and these sections are pertinent because the Congress of the United States has established a method for revocation of probation which coincides with much of the decisional law heretofore existing. It is a violation of the defendant's right of due process for him to be incarcerated while on probation where probation has not been revoked, nor an inquiry held to justify its revocation.

In *Escoe* v. *Zerbst*, 295 U. S. 490, page 494, the Court said:

> "Referring to a revocation of probation without a hearing, the attempted revocation is invalid for defect of power and with the suspension still continuing, the petitioner is entitled to a discharge from his confinement."

The Court stated further:

> "The defendant should be protected against malice or oppression * * * almost equally it is necessary if we read or write the thought of Congress for the good of probation system with its hope of social betterment."

What has happened here is that the petitioner was sentenced to a penitentiary term for an act committed prior to his probation. He did not violate his probation. He did nothing which would cause its termination, nor did the Court or the United States attorney make any effort to terminate the probation.

What is lacking here is a failure of proper legal process on behalf of the United States. If a hearing had been held, if after such hearing the Court had found it proper to revoke the probation—if there had been some effort at due process, the petitioner would have no complaint about his incarceration.

This denial of due process becomes more significant when we know that the act for which he is presently incarcerated occurred prior to the judgment of probation fixed by a Judge of the United States District Court. The subsequent sentencing was had while the petitioner was on probation. He in no way, violated its terms.

The court below relied on the cases of *United States ex rel. Demarois* v. *Farrell*, 8 Cir., 87 F. 2d 957, cert. den. 302 U. S. 683, rehearing den. 302 U. S. 775; *McGuire* v. *Warden, United States Penitentiary*, D. C. W. D. Penn., 122 F. Supp. 699. *Cf. United States* v. *Tacoma*, 2 Cir., 199 F. 2d 482.

The *Farrell*, *McGuire* and *Tacoma* cases referred to by Judge Bryan (32a) have no reference to this case since in all of these cases the crime was committed subsequent to the probation and while the defendant was on probation. The acts of the defendant in these cases referred to by the Court were a violation of the defendant's probation. Reference to them will make it imminently clear that in each, the probation sentence was revoked after appropriate hearing.

The government, by the return of the Indictment 154-86 on October 22, 1957, tried to give the impression that the return date of the indictment was when the crime charged to the defendant was committed. Again, the indictment must concern itself with the overt acts and the government conceded that from March 5, 1954 in its brief in the court below, and I quote:

> "Gelb was arrested on March 5, 1954. At that time his participation in the conspiracy charged in Indictment 154-86 concededly terminated".

From the facts herein and from the concession of the government there was no violation of parole or probation and the defendant was denied due process by his present continuous confinement in a federal penitentiary.

There is nothing in Judge Kaufman's judgment which makes the penitentiary sentence concurrent with the prior sentence of Judge Ryan. Therefore, Judge Kaufman's sentence must follow the probation, not toll it.

Assuming, *arguendo*, that the Court could overrule the probation sentence of Judge Ryan, then, in effect, we would arrive at a result where the defendant is faced with a probation occurring after his new penitentiary sentence. This, in effect, suspends the order of Judge Ryan and in further effect enlarges the sentence which he has imposed. This result is void for defect of power in the Court and it was so pointed out in *Frad* v. *Kelley*, 302 U. S. 312.

The petitioner on his release on November 14, 1957, from Leavenworth became a conditional parolee, and a probationer. A parolee and probationer may have these terms interrupted only if he commits a new distinct offense—not if the offense was committed prior to his parole and probation.

The Indictment 154-86, did not describe, a new overt act of petitioner. Though returned on October 23, 1957, related to petitioner's acts prior to his arrest of March 5, 1954, and prior to his incarceration.

Petitioner does not claim, as Judge Bryan contends that prior crimes were merged in the probation sentence.

But he does contend that on May 18, 1956, when he was sentenced by Judge Ryan, the Court should have been informed of his prior acts and conduct.

It must be conceded that petitioner, committed no offense since March 5, 1954. He was in the custody of the government.

They hoped for a consecutive confinement, sentence. Sentencing a criminal is a matter of judicial discretion, and may not be dictated by the prosecutor or the defendant.

Both parties are bound by the sentence. If the sentence, gives him immunity from confinement on terms, and conditions, and on probation it must be upheld.

The dissatisfaction of the sentence, must not be expressed, in the form of a new indictment, and a prison confinement. It must and should be in a hearing to revoke parole and probation.

If the court gave petitioner immunity, by the sentence of Judge Ryan, it must not be taken away without judicial process.

Mr. Justice Kaufman, in imposing sentence, under Indictment 154-86, on April 20, 1958, not only acted as a sentencing judge, but also as a parole board, and a probation review board. This was not his judicial function.

The petitioner was not given a hearing to revoke parole or probation, nor can it be deemed, that the hearing before Mr. Justice Kaufman was a hearing to revoke probation.

For 2½ years the defendant was incarcerated and they took no action based on the statement of the government, because the government was determined to keep this man confined in prison. He is still a human being with rights, and the fundamental principles of due process.

POINT II

From the foregoing facts and from the concessions made by the government, the petitioner had withdrawn from the conspiracy on March 5, 1954. On that date, Title 18, Section 3282 was in force at that time and stated that offenses in capital must be prosecuted and tried within three years. This section was amended on September 1,

1954 to increase the period to five years. The petitioner was incarcerated on May 5, 1954 and was not released until November 23, 1957 and was within the custody, care and control of the federal government. They not only knew of the whereabouts of this petitioner, but had full knowledge of all his activities as expressed in the statement of Mr. Patterson on May 5, 1954:

> "Mr. Patterson: Yes. He faces a number of charges as the result of the making of this case."

The defendant was in custody for the crime for which he was later indicted in 1957. While the statute of limitations is not a vested right, the change in the law under these circumstances is in exculpation of a defense which existed in March, 1954.

Reference to the decisional law is not helpful. The Court have dealt with cases where the defendant was not in custody prior to the change in the statute, or at least not in custody by Federal authorities.

The ineptness in the failure of counsel to plead such defense on defendant's behalf should not impose a penalty upon the defendant. The United States Attorney's office knew of the acts which constituted the crime.

The delay in indicting the defendant for three years is not in conformity with our concept of justice and the propriety of its administration.

Concededly, delays enabling the government to perfect its proof cannot be avoided. Here, the government announced in open court that it had the requisite evidence. To then wait 3 years tramples the guarantees of speedy trial.

The court below relies on *U. S. v. Reinie*, 242 Fed. 2 302, where the court held:

> "Once it is shown that a person has become a party to a conspiracy the law presumes he remains a party while it continues."

This contention is negatived by the government brief submitted on June 10, 1959 in the Circuit Court of Appeals.

> "Gelb was arrested on March 5, 1954. At that time his participation charged in Indictment C154-86 concededly terminated". (p. 9 of brief)

The petitioner, by his confinement and from the facts herein adduced was no longer part of the conspiracy. In *U. S.* v. *Rolen*, 173 Fed. 459:

> "Where conspirators are acting together for a common purpose comprehended to a scheme, limitations begin to run from the last overt act, except as to the conspirator who has withdrawn from the scheme."

Thus, the government had custody of the petitioner, knowledge of his activities, his known withdrawal from the conspiracy. Yet they insist that the 5-year amendment applies to petitioner. Is this not an *ex post facto* law as to him?

The Congress, in the amended law, stated, "if on such date prosecution is not barred."

Yet here, the custody of the defendant is important. As stated in *U. S.* v. *Satz*, 109 Fed. 94:

> "Statutes of limitation are matters of repose and should be liberally construed in favor of the defendant."

The three-year statute should apply to petitioner.

The court below, by Judge Bryan in his decision, went so far as to say that a plea of guilty to an indictment covers every overt act alleged therein. The indictment below was on a single count of conspiracy and how can the court state that a man can plead guilty to overt acts when he had withdrawn from the conspiracy; had been in the custody of the federal government and make an admission by saying the word "guilty" he admits to facts of which he had no part or parcel.

POINT III

The reputation, the character or conduct of the defendant should not obliterate the propriety of his position and legal efficacy and merit of defendant's application for release. The last act chargeable to this defendant occurred on March 5, 1954 which is supported by a concession of the government and from the facts set forth in the indictment. If all the facts were known to the government prior to his confinement on March 5, 1954, the petitioner herein should have been granted a hearing to determine these issues. This is an application of a coram nobis, though labelled a petition to correct an illegal sentence if facts are presented that create an issue, the court must assist the petitioner for available means to correct an injustice. There were such issues here.

Judge Edward Lumbard was the United States Attorney when the defendant was arrested and was the United States attorney for some time prior thereto. When this petitioner came before the Court of Appeals the failure of the judge to disqualify himself in the argument of this motion, was prejudicial to this petitioner, and was a denial of due process. His office was being questioned as to certain facts.

An issue was created by the statement of the United States Attorney at the sentence on May 5, 1954. This was borne out by the subsequent indictment and while the petitioner was in their custody and by the concessions and knowledge of the government of petitioner's activities.

All of the overt acts in the following indictments, were prior to March 5, 1954, and not later.

There were triable issues of fact and questions of laches on the part of the government to be tested on the hearing if granted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

GERTRUDE GOTTLIEB and
HARRY SALVAN,
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124 White Street,
New York, N. Y.

Appendix A

(Opinion of United States Court of Appeals, for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

October Term, 1958.

(Argued June 1, 1959 Decided June 17, 1959.)

Docket No. 25685

UNITED STATES OF AMERICA,

Appellee,

—v.—

SAUL GELB, also known as SOL GORDIN,

Appellant.

Before:

CLARK, *Chief Judge*, and
LUMBARD and WATERMAN, *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York, Frederick van Pelt Bryan, *Judge*.

Saul Gelb appeals from an order denying his motion under 28 U. S. C. § 2255 and Fed. R. Crim. P. 35 to vacate

a sentence of imprsonment on plea of guilty to a narcotics charge because at the time he was on parole for another crime and awaited probation on still another crime, or alternatively because the statute of limitations had run.

HARRY SALVAN, New York City, for appellant.

HERBERT F. ROTH, Asst. U. S. Atty., S. D. N. Y., New York City (S. HAZARD GILLESPIE, JR., U. S. Atty., and KEVIN THOMAS DUFFY, Asst. U. S. Atty., New York City, on the brief), for appellee.

PER CURIAM:

Affirmed on the opinion of District Judge Bryan, D. C. S. D. N. Y., May 12, 1959.